

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**342**

**KA 18-00225**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE E. LOPEZ-NUNEZ, ALSO KNOWN AS  
ALEX O. GONZALEZ, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY WALENDZIAK OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County  
(Charles A. Schiano, Jr., J.), rendered November 29, 2017. The  
judgment convicted defendant upon his plea of guilty of attempted  
criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is  
unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him  
upon his plea of guilty of attempted criminal possession of a weapon  
in the second degree (Penal Law §§ 110.00, 265.03 [3]) and sentencing  
him as a persistent violent felony offender. We agree with defendant,  
and the People correctly concede, that the waiver of the right to  
appeal is invalid. Supreme Court's "oral waiver colloquy and the  
written waiver signed by defendant together 'mischaracterized the  
nature of the right that defendant was being asked to cede, portraying  
the waiver as an absolute bar to defendant taking an appeal and the  
attendant rights to counsel and poor person relief, as well as a bar  
to all postconviction relief, and there is no clarifying language in  
either the oral or written waiver indicating that appellate review  
remained available for certain issues' " (*People v Johnson*, 192 AD3d  
1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; see *People v  
Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634  
[2020]; *People v Benjamin-Foster*, 215 AD3d 1277, 1277 [4th Dept 2023],  
*lv denied* 40 NY3d 927 [2023]).

At sentencing, defendant admitted his prior convictions and did  
not dispute the periods of incarceration listed in the persistent  
violent felony offender statement. On appeal, relying on *Erlinger v  
United States* (602 US 821 [2024]), defendant contends that the  
sentencing procedure pursuant to which he was adjudicated a persistent

violent felony offender is unconstitutional, requiring remittal for resentencing as a first-time felony offender. Defendant failed to preserve his contention for our review (see *People v Hernandez*, – NY3d –, 2025 NY Slip Op 00904, \*3 [2025]). Defendant also failed to preserve for our review his contention that the People failed to comply with CPL 400.15 (2) because they did not list the actual correctional facilities where defendant was imprisoned (see *People v Pellegrino*, 60 NY2d 636, 637 [1983]; *People v Hernandez*, 188 AD3d 1357, 1359 [3d Dept 2020], *lv denied* 36 NY3d 1057 [2021]; *People v Camp*, 134 AD3d 1470, 1471 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).